No. 14693

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAY W. BENTLEY, RAYMOND L. RUSNAK and JOSEPH HOMAN,

Appellants,

v.

ROSEBUD COUNTY, MONTANA, a body corporate,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

REPLY BRIEF OF APPELLANTS

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Filed ....., 1955

....., Clerk

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TABLE OF CITATIONS

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Argument

The defendant, Rosebud County, Montana, in the portion of their brief at the very outset are evidently attempting to assert that since the plaintiffs and appellants settled this case with the former defendants, Roy M. King et ux. and Edward L. Grebe et ux., the plaintiffs lost the right to appeal to this court from that portion of the judgment in favor of Rosebud County, Montana. No authority for this proposition as such has been cited by the defendant. This assertion by the defendant is made despite the findings of fact prepared and submitted by the defendant, No. VI of which reads as follows:

> "That the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants and the order entered thereon does not affect the issue of title to be determined by the Court." (Trans. p. 30)

The defendant states that the royalty reservation made in the

deed from Rosebud County to King and Grebe depends upon title of the minerals in King and Grebe, apparently because of the theory advanced that a royalty reservation is only an interest in personal property. The two cases cited by the defendant in support of this latter proposition on page 6 of their brief hold only that a royalty is not an interest in the minerals in place; they do not hold that a royalty is not an interest in real property. The case of

Marias River Syndicate v. Big West Oil Co.,
98 Mont. 254, 38 Pac. (2d) 599

holds that a royalty interest is an interest in the land itself, the court stating as follows:

> "This right (royalty), if it belongs to the individual distinct from the ownership in other lands, takes the character of an interest or an estate in the land itself. It is an interest in the land, although incorporeal. Williard v. Fed. Surety Co., 91 Mont. 465, 8 P. (2d) 633. Such an interest in land may be conveyed (Krutzfeld v. Stevenson, supra), and may likewise be excepted or reserved from conveyance." (Pac. citation at page 601)

In order for the defendant to recover in this cause it must in any event show the validity of the tax deed proceedings which it has pleaded. The plaintiffs made out a prima facie case of ownership of all of the land and interest therein by the introduction without objection of the deeds to the plaintiff, May W. Bentley, and to the other two plaintiffs from May W. Bentley. At this point in the trial of the cause, the plaintiffs proved ownership of the lands involved and all of the interests therein and it then became incumbent upon the defendant to prove a superior title. See

Collins v. Thode,
54 Mont. 405, 411, 170 Pac. 940, 941, and

Rude v. Marshall,
54 Mont. 28, 166 Pac. 298.

Both of the above cited cases held that the plaintiff, in a quiet title action, proves a prima facie case by proof of the delivery and execution of a deed covering the property involved to the plaintiff and that then the burden of proof was upon the defendant to show his title. The plaintiffs do not claim title through either Rosebud County, Montana, or through the other defendants with whom this cause was settled, and therefore defendant's statement that plaintiffs' case against the defendant, Rosebud County, Montana, is moot because the plaintiffs settled the case against other of the defendants is without merit, since the plaintiffs' claim to title is completely independent from any of the defendants.

Since *Section 93-6203, Revised Codes of Montana, 1947,* allows the plaintiff to quiet title against any person who claims or who may claim "any right, title, estate or interest therein", and since a royalty is an interest in land, the plaintiff has the right, and the court can adjudicate, the ownership of the royalty claimed by the defendant, Rosebud County, Montana.

I.

VALIDITY OF TAX DEED PROCEEDINGS.

The defendant states that the case of

Perry v. Maves,
125 Mont. 215, 233 Pac. (2d) 820,

is "no authority whatsoever" for the plaintiffs' contentions in the instant case. Defendant states it is no authority for the reason that the affidavit in the Perry case is different from the affidavit in the instant case, and we readily concede that the affidavits are not identical. However, the principle of law enunciated in the Perry case, *supra,* is in point with the case here involved, that principle is the law of Montana, and, as

argued in plaintiffs' first brief, is controlling in the instant case. To the contrary, however, the case of

Milne v. Leiphart,
119 Mont. 263, 174 Pac. (2d) 805,

cited by the defendant is not authority for the proposition that the affidavit in the instant case is sufficient. In the Milne case, it affirmatively appeared that the Notice of Application for Tax Deed was mailed on the same day that it was dated, more than sixty days prior to the actual application for the tax deed. It cannot be determined from the Milne case whether the date that the notice was mailed appeared in the affidavit or not, but the Perry case, decided after the Milne case, clearly requires that all the facts regarding the required service appear in the affidavit before the county treasurer has any jurisdiction to issue a tax deed.

Counsel for the defendant, in citing *Section 2209, Revised Codes of Montana, 1935,* which states that an affidavit must be filed with the clerk and recorder of the county in which the real property is situated, completely ignores *Section 2212, Revised Codes of Montana, 1935,* which requires that no deed shall be issued by the county treasurer to the purchaser of the property until after such purchaser shall have filed with the treasurer an affidavit showing that the notice required to be given *"has been given as herein required."* That the affidavit of service must be filed with the county treasurer before the treasurer has any jurisdiction to issue a deed to any person purchasing tax land is without any doubt the law of Montana and has been so held in a number of Montana cases without any decisions to the contrary. See

Cullen v. Western Mortgage and Warranty Title Co.,
47 Mont. 513, 134 Pac. 302;

Harrington v. McLean,
70 Mont. 51, 223 Pac. 912;

Gallash v. Willis,
90 Mont. 148, 300 Pac. 569;

Sanborn v. Lewis & Clark County,
113 Mont. 1, 120 Pac. (2d) 567;

Jensen Livestock Co. v. Custer County,
113 Mont. 285, 124 Pac. (2d) 1013,
140 A. L. R. 658; and

B. Kesselheim, Inc. v. Cocklin,
116 Mont. 150, 148 Pac. (2d) 945.

All of the above cited cases held that before the county treasurer has any jurisdiction to issue a tax deed to a purchaser of tax lands from a county, an affidavit of service showing that notice of application for tax deed was properly served and/or published must be filed with the county treasurer. The above cited cases are given in addition to the Perry case, *supra.* The Perry case, *supra,* quoted Section 2212 as the court's authority requiring that a proper affidavit be filed with the county treasurer before the county treasurer has jurisdiction to issue a tax deed.

Defendant's contention that, though Section 2212 may require some purchasers to file an affidavit with the county treasurer, if the county is purchasing no such requirement is in effect, is directly contrary to the law set forth in the *Perry* case. At the time of the Perry decision, *Section 2209.1, Revised Codes of Montana, 1935,* relied upon by the defendant for its proposition, was in effect. Despite this statute, the Perry case required that a county must file a sufficient affidavit with the county treasurer in accordance with Section 2212 before the county can obtain a valid tax deed. The statement of the defendant that its suggested theory was not before the court in the Perry case is presumptious; how does the defendant know what theories

were advanced to the Montana court in the Perry case? No matter what legal theory or theories were or were not advanced by counsel in the Perry case, that case held that a county must file a sufficient affidavit with the county treasurer to obtain a valid tax deed, and on the facts completely destroys any merit in the defendant's theory that the county need not file such an affidavit with the county treasurer.

The defendant in its brief apparently does not contest the fact that the affidavit filed with the county treasurer was not sufficient to show a proper publication of notice, but only argues that no publication of notice was required in the instant case. Defendant's reasoning for this contention is apparently upon the basis that the address of May W. Bentley was known, and therefore under the authority of *Section 2209, Revised Codes of Montana, 1935,* and Milne v. Leiphart, *supra,* no publication is therefore required. However, it affirmatively appeared from the affidavit of proof of service filed in the treasurer's office that *the registered letter mailed to May W. Bentley containing the notice of application for tax deed was returned unclaimed.* Under the authority of

Sutter v. Scudder,
110 Mont. 390, 103 Pac. (2d) 303,

it then became imperative that the notice of application for tax deed be published, the court stating as follows:

> "Had the registered letter not been returned to the sender, there would have been a strict compliance with the statute without the publication of notice. Since, however, that letter was returned, there was some proof that the address was then unknown, which made it necessary to publish the notice."

The Sutter case is the law of Montana, and without any doubt requires that the notice of application for tax deed be published in accordance with *Section 2209, Revised Codes of Montana, 1935.* That the affidavit and proof of service does not properly

show a compliance with the publication requirement has been fully discussed in plaintiffs' first brief and need not be repeated here since the defendant has not disputed the insufficiency of the affidavit in that respect.

II.

THE REQUIREMENTS OF MUTUALITY OF DECREE AND ADVERSARY PARTIES TO SUPPORT THE DOCTRINE OF RES ADJUDICATA.

First, the practice of the defendant in apparently quoting, as the defendant has done on page 22 of its brief, from a brief prepared for the trial court in this cause is not proper since any briefs previously prepared for the trial court are not before the Circuit Court in any manner and such practice should not be permitted.

None of the cases cited by the defendant at pages 22 and 23 of their brief referring to the question of mutuality of remedy are in point to show that the remedy here was mutual between the parties. We have no argument with the statements by the defendant to the effect that a quiet title action is one *in rem* and not *in personam* and that decrees in suits to quiet title are intended to stand for all time as muniments of title. But these general propositions do not change the rule as it has been set forth in the plaintiffs' first brief that in order for one party to plead as res adjudicata, a judgment, such judgment must be mutual so that the other party could have pleaded same against the party setting up the judgment as a bar. Since, as pointed out in the plaintiffs' first brief, no proper service was rendered in the cause attempted to be set up as res adjudicata upon Rosebud County, Montana, neither the plaintiff, May W. Bentley, nor her successors could plead any judgment against Rosebud County, Montana, as a bar since obviously the court in that action did not have jurisdiction over Rosebud County,

Montana. Therefore, the defendant, Rosebud County, Montana, is attempting to set up as a bar a judgment against May W. Bentley that could not be set up by May W. Bentley against the county if the judgment has been in her favor. For this reason the judgment is not mutual and therefore comes squarely within the rule announced in the cases cited in the plaintiffs' first brief.

Nor is plaintiffs' position inconsistent as claimed by the defendant at page 24 of their brief. The plaintiffs merely claim that the defendant cannot set up the judgment as a bar against the plaintiffs for the reason that, since the court in the first action had no jurisdiction over the defendant, Rosebud County, Montana, the plaintiff could not set up the judgment against the county and therefore the remedy is not mutual. This in nowise admits that the judgment is binding against the plaintiffs. Certainly the defendant does not maintain that the judgment is a bar against either the plaintiffs or the defendant if no proper service of process was made upon either.

Counsel for the defendant have, no doubt unintentionally, mis-stated the contents of plaintiffs' first brief. The defendant states on pages 24 and 25 of its brief that the plaintiffs at page 21 of their brief "point out that this judgment in fact does bar Rosebud County and May W. Bentley." No such statement was made by the plaintiffs. The plaintiffs' brief at page 21 merely said that the judgment "purported to bar Rosebud County, Montana" and that the judgment pleaded "holds that neither Rosebud County, Montana, nor May W. Bentley, nor the other defendants, have any interest in the real property involved." These statements certainly do not say that "the judgment in fact does bar Rosebud County and May W. Bentley."

Turning now to the defendant's argument concerning the

requirement that parties must be adversaries in order that a judgment may be pleaded as res adjudicata against one or the other, let it be first said that the case of

Ocean Accident & Guarantee Corp. v. United States Fidelity & Guaranty Co., 162 Pac. (2d) 609,

cited by the defendant correctly states the law regarding the necessity that parties must be adversary before a judgment can be res adjudicata between them. Certainly, however, the defendant does not claim that any issues or questions between May W. Bentley and Rosebud County were asserted or maintained by either May W. Bentley or Rosebud County in the action pleaded since neither of the parties appeared, pleaded or took part in the former action. And likewise, no issues could have been raised between May W. Bentley and Rosebud County since neither appeared in the action. The second case cited by the defendant,

Klinker v. Klinker, 283 Pac. (2d) 83,

has no application to the instant case since in the Klinker case there was no doubt about the fact that the parties were adversary and the requirement of adversary parties as applied to the doctrine of res adjudicata was not even mentioned by the California court in that case. The Klinker case merely recited the basic rules required for the application of the doctrine of res adjudicata between parties who were admitted adversaries without any doubt.

Likewise, the plaintiffs have no argument with the defendant's statement in their brief that the plaintiffs must rely upon the strength of their own title and not the weakness of their adversaries. However, the plaintiffs have shown their title by virtue of the deeds introduced in evidence by the plaintiffs,

the county has attempted to attack the plaintiffs' title by virtue of the tax deed and judgment pleaded as res adjudicata, and the defendant then has the burden of showing these defenses to be valid. There is no question of the plaintiffs' relying on the weakness of the defendant's title for the plaintiffs' title was proved without contradiction and the defendant has the burden of overcoming such prima facie case.

It must be noted that the defendant has not cited to this court even one case where judgment has been held to be res adjudicata *in favor of* a defendant against whom the judgment was rendered. For the defendant, Rosebud County, to set up a judgment as a bar against anyone, plaintiff or co-defendant, which judgment recites that Rosebud County has no right, is on its face illogical and anomalous.

III.

JURISDICTION OF THE COURT IN THE FORMER DECREE QUIETING TITLE OVER MAY W. BENTLEY.

Plaintiffs believe that their brief adequately covers the question of the adequacy or inadequacy of the service of process upon May W. Bentley in the quiet title action pleaded as res adjudicata with the exception of one point. The defendant states that since the affidavit for publication of summons in the former quiet title action stated the place where May W. Bentley resides, no evidentiary facts need be recited to show the basis for such recitation, citing the case of

Aronow v. Anderson,
110 Mont. 484, 104 Pac. (2d) 2,

The defendant, however, overlooks that the affidavit does not *state that May W. Bentley resides at Madison, Wisconsin.* It states only that May W. Bentley "last resided at" Madison, Wisconsin, without any statement as to where she actually pres-

ently resides and no facts showing any search for her actual and then present residence of any kind. Under the doctrine of the Aronow case, relied upon by the plaintiffs in their first brief, it clearly appears affirmatively from the judgment roll that no valid service of process was ever obtained on May W. Bentley and therefore the former quiet title action is no bar to the plaintiffs for this additional reason.

IV.

LACHES

Though the defendant did plead a defense of laches, there is no evidence of any kind in the record and before the court upon which the defendant can rely to show and prove any of the allegations of their defense of laches.

Respectfully submitted,
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By.....